UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

J&J SNACK FOODS HANDHELDS CORP.

and

Cases 19-CA-126632
19-CA-127401
19-CA-127413
19-CA-127689
19-CA-134279

TEAMSTERS, WAREHOUSEMEN, GARAGE
EMPLOYEES AND HELPERS, LOCAL UNION NO. 839,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND MOTION TO STRIKE EXTRA-RECORD EVIDENCE

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I. INTRODUCTION

This case concerns the efforts of representatives of Teamsters, Warehousemen, Garage Employees and Helpers, Local Union No. 839, affiliated with International Brotherhood of Teamsters (the "Union") to represent the employees of J & J Snack Foods Handhelds Corp. ("Respondent"), and the extraordinary and unlawful actions taken by Respondent, to both interfere with its employees' rights, and to undermine the efforts of the Union, culminating in the ban of Union Representative, Richard Davies ("Davies") from Respondent's facility.

Following issuance of a Consolidated Complaint, this case was heard by the Honorable Eleanor Laws (the "Judge") from December 16 through 19, 2014, in Pendleton, Oregon, and on January 8, 2015, via videoconference in Portland, Oregon. On March 13, 2015, Administrative Law Judge Eleanor Laws (the "Judge") correctly found that Respondent violated § 8(a)(1) by: telling its employees that the Union's representative was no longer permitted on Respondent's premises; failing and refusing to recognize the Union's representative; denigrating and disparaging the Union; encouraging its employees to abandon support for the Union and its representative; and promising its employees, by soliciting employee complaints and grievances, increased benefits and improved terms and conditions of employment if they abandoned their support of the Union. (ALJD 29:9-15).[1]

The Judge also properly found that Respondent violated §§ 8(a)(1) and (5) by: soliciting its employees to indicate whether their contact information could be shared with the Union; soliciting its employees to communicate shift preferences directly to the Respondent in a manner that implied that granting the shift preference depended on whether they indicated their contact information could be shared with the Union; ceasing its practice of providing its employees with cooked food products in the cafeteria;

[1] References to the ALJD will be referred to as "ALJD" followed by the appropriate page number(s) and, where applicable, followed by a colon and the particular line number(s). References to the official transcript in this proceeding will be designated as (Tr.__). References to exhibits of Counsel for the General Counsel, Charging Party and Respondent in this proceeding will be referred to as "GCX," "CPX" and "RX", respectively, followed by the exhibit number. References to joint exhibits will be referred to as "JTX" followed by the exhibit number.

implementing a requirement that Union representatives provide the plant manager with 24-hour advance notice of their visits to the facility; implementing a requirement that Union representatives sign in and out of the plant with either the plant manager or the human resources manager; implementing a requirement that Union representatives visit the plant during administrative hours; implementing a requirement that the Union representatives confine their visits to the cafeteria; imposing a requirement that Union representatives not use the cafeteria as a union hall and limit visits to a "respectable" amount of time; and banning Davies from the facility. (ALJD 29:16-28).

Following issuance of the Judge's well-reasoned decision, Respondent filed exceptions and a supporting brief with the Board seeking reversal of virtually all of the Judge's findings by resurrecting discredited testimony, mischaracterizing record evidence, adding evidence that it failed to elicit at hearing, while asserting no facts or law that would warrant reversal.[2] Contrary to Respondent's misguided attempts and fallacious arguments, the Judge's findings and conclusions are appropriate, proper, and amply and fully supported by law and the record evidence in all respects. As such, Counsel for the General Counsel ("General Counsel") respectfully requests that the Board reject Respondent's exceptions, affirm the Judge's rulings, findings and conclusions, and adopt the remedial relief ordered.

II. RESPONSES TO RESPONDENT'S EXCEPTIONS

A. The Judge Correctly Found that Respondent Violated §§ 8(a)(1) And (5) By Banning Union Representative Davies, Failing to Recognize Mr. Davies as the Union's Representative, and Telling its Employees That Representative Davies was Banned (Exceptions 1-2)

Respondent argues (Resp. Br. at 7) that the Judge both failed to: (1) apply Board precedent holding that an employer may lawfully refuse to meet with a union representative when that representative

[2] The only findings to which Respondent does not except are the Judge's findings that Respondent violated the Act by: [1] promising employees, by soliciting employee complaints and grievances, increased benefits and improved terms and conditions of employment if they abandoned their support of the Union; [2] soliciting employees to indicate whether their contact information could be shared with the Union; and [3] soliciting employees to communicate shift preferences directly to the Respondent in a manner that implied that granting the shift preference depended on whether they indicated their contact information could be shared with the Union.

has engaged in conduct that is potentially unlawful harassment; and (2) appropriately analyze and apply Board case law allowing an employer to ban a union representative whose presence created ill will that made good faith bargaining impossible. Both contentions are meritless.

1. The Judge Did Not Fail To Apply Board Precedent

While Respondent argues that the Judge failed to apply Board precedent, Respondent did not cite any Board cases to the Judge. Rather, in support of its claim, Respondent asserts that the Judge erred by failing to discuss and analyze whether Davies' conduct amounted to unlawful sexual harassment as suggested in the Advice Memorandum in *Chas H. Lilly Co.*, 30 NLRB AMR 40055 (1996), and then incredibly, attempts to argue that two Title VII cases involving egregious conduct by customers and an employer's vice-president, respectively, can somehow, be applied (or even compared) to the facts of this case.[3]

As an initial matter, administrative law judges have no duty to apply or analyze cases that do not address Board law. Rather, they have a duty to apply established Board precedent, unless that precedent has been reversed by the Board itself or by the Supreme Court. *Lee's Roofing & Insulation*, 280 NLRB 244, 247 (1986), citing *Ford Motor Co.*, 230 NLRB 716 (1977), *enfd.*, 571 F.2d 993 (7th Cir 1978), *affd.,* 441 U.S. 488 (1979). Contrary to Respondent's arguments, it has long been established that Advice Memoranda do not constitute Board precedent. *See New Process Steel, LP*, 353 NLRB 111, 118 n. 16 (2008); *Delaware Racing Ass'n*, 325 NLRB 156, 158 (1997); *Lee's Roofing & Insulation*, 280 NLRB at 247. Thus, the Judge did not err by refusing to apply the analysis set forth in the Advice Memorandum, and her conclusion that "the Board lacks jurisdiction to determine the merits of a Title VII gender discrimination claim" was proper. (ALJD:18 n.24)

[3] Respondent cites to *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992) (Court finds employer responsible for sexual harassment of employee by customers, after ignoring employee's complaints of comments such as "great tits" and "great legs," and then telling the employee that the customer "was allowed to stare at whatever he wants and for as long as he wants"); and *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994) (Court finds employer liable for sexual harassment based on vice-president calling an employee a "cunt," suggesting to employee that she suck a customer's dick, and commenting to another employee about the size of her "boobs" after being reprimanded for harassing behavior).

2. The Judge's Application and Analysis of Board Precedent Was Proper

It is well established that each party to a collective-bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party. *Long Island Jewish Med. Ctr.*, 296 NLRB 51, 71 (1989) (unlawful to ban from facility newly appointed union representative who physically pushed employer representative, cursed at her on multiple occasions, blocked her from leaving desk, cursed at another administrator and engaged in a shoving match with her). Those situations in which a party will be excused from this duty are "rare and confined to situations so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical." *Id.* at 71, citing *Gen. Electric Co. v. NLRB*, 412 F.2d 512, 517 (2d Cir. 1969).

Here, the credited evidence revealed that, during a grievance meeting, Davies got into an argument with Respondent's representative Karyn Schofield ("Schofield") over the meaning of a grievance written in Spanish. (Tr. 81:13-82:6). The Judge concluded that, during this meeting, Davies made comments about his having superior Spanish skills, called Schofield's competency into question, asserted his own superiority, told Schofield she was incorrect on various points, and that he also referred to one of Respondent's attorneys as an "ass." (ALJD 17:33-22). Nevertheless, she correctly found that Davies' "choice of language, while strong and perhaps intemperate, was not so offensive, flagrant, violent, or extreme as to render him unfit for further service." *Transcon Lines*, 235 NLRB 1163, 1165 (1978). (ALJD 18:23-26). She further noted that, even if she credited Respondent's version of the facts, Davies' conduct was still not egregious enough to justify his removal from Respondent's facility.[4] (ALJD 17:16-17).

Respondent also points to conduct in which Davies' allegedly engaged on April 22, 2014, including calling Plant Manager Adam Ligon ("Ligon") an "ass," and referring to Schofield by the pronouns "she" and "her" to defend its decision to ban Davies from the Plant. However, the Judge rightly did not credit

[4] The Judge properly discredited the testimony of Respondent's witness, Sandy McCullough ("McCullough"), with respect to her claims that Davies called Schofield a "monolingual idiot," a liar, and that Davies asked Schofield why she had to be so ugly and why she had to be so mean. (ALJD 17 21:18:17).

Respondent's witness concerning the "she" and "her" comments.[5] She also correctly found that Davies, who admittedly used the term "ass" with respect to Ligon, was provoked by Ligon's conduct; thus, his comment could not be relied upon by Respondent. (ALJD 18:28-29, 19:24-25, 39-42). Respondent's attempt at attacking the Judge's conclusion by claiming that Ligon simply announced an unlawful unilateral change and did not actually provoke Davies' conduct, borders on the ridiculous, and should be rejected. (Resp Br. at 10, n.5).

Lastly, neither of the two cases cited by Respondent in its brief, *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980), or *CBS, Inc.,* 226 NLRB 537, 539 (1976), are factually on point, nor do they support Respondent's arguments. In *Fitzimmons*, the employer was "relieved of its duty to deal with [a] particular representative" because that union representative had engaged in an unprovoked assault of an employer official at beginning of grievance proceeding and "collective bargaining [was rendered] impossible or futile." In *CBS*, the employer was justified in refusing to deal with a particular union representative due to a conflict of interest. Both are inapposite. As such, the Judge's findings should be affirmed.

B. The Judge Correctly Found That Respondent Violated §§ 8(a)(1) and (5) By Unilaterally Ceasing Its Practice Of Providing Food Samples (Exceptions 3-4)

Respondent argues at (Resp. Br. at 11) that the Judge erred in determining that Respondent violated its bargaining obligation by unilaterally suspending the provision of QA samples because: 1) the suspension did not result in a material, substantial and significant change to working conditions; 2) no enforceable unbroken past practice existed; and 3] the change was necessitated by law. Respondent's arguments are supported by neither the record nor precedent.

[5] Even if the Judge had not discredited the witness regarding Davies having referred to Schofield as "she" and "her," to the extent Respondent suggests that "she" and "her" could have some meaning or use other than as generally accepted pronouns used to refer to a female, that less discernible meaning is neither explained on the record nor in Respondent's brief.

1. The Judge Properly Found that Suspension of QA Samples Resulted in a Material, Significant and Substantial Change

As the Judge correctly delineated, an employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. (ALJD 23:26-28). *See NLRB v. Katz*, 369 U.S. 736, 747 (1962). However, such a duty to bargain only arises if the changes are "material, substantial and significant." (ALJD 24:10-12) quoting *Alamo Cement Co*., 281 NLRB 737, 738 (1986). It is well established that cessation of food or drinks may be material, substantial, and significant even if the items are of low value. *See Wisconsin Steel Indus.*, 321 NLRB 1394 (1996) (elimination of coffee and donuts on paydays unlawful); *Poletti's Restaurant*, 261 NLRB 313 (1982) (elimination of free desserts); *Doral Beach Hotel*, 245 NLRB 561 (1979) (discontinuation of permitting certain employees to have two free beers or soft drinks).

The record evidence established that each hour, 2-3 days each week, Respondent removes a carton of eight pizza pockets from its production line, deep fries them for evaluation in its QA Lab, and then places 20-40 pizza pockets in the cafeteria for employees to consume on a first-come, first serve basis. (ALJD 5:16-23). The pizza pockets are sufficiently large enough to serve as a meal, and the undisputed testimony was that many employees relied on the samples for lunch. (ALJD 5:24-25). Thus, as correctly concluded by the Judge, the record evidence, as well as Board precedent, supports a finding that Respondent's practice of distributing pizza pockets to employees 2-3 times per week, constituted a benefit to employees that was material, substantial and significant. (ALJD 24:4-9).

2. The Judge Correctly Found That Providing Free Food Was a Past Practice

"An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective bargaining representative notice and an opportunity to bargain over the proposed change." *Sunoco, Inc.*, 349 NLRB

240, 244 (2007). To qualify as a past practice over which a bargaining obligation attaches, "[a] past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis." *Id.* citing *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353-54 (2003); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999). Such was the situation with the pizza pockets in this case.

As the Judge correctly found, the record evidence established that, for roughly two years prior to March 2014 (when Respondent ceased distributing the pizza pockets), Respondent's practice of providing pizza pockets to employees occurred with sufficient regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis. (ALJD 25:27-32). The fact that Respondent unilaterally ceased its weekly provision of food to employees for a few months in February 2012 does not, despite Respondent's urging to the contrary, convert a regular practice into one that is intermittent. Thus, Respondent's reliance on the finding in *Philadelphia Coca-Cola*, 340 NLRB 353-54, involving intermittent and irregular production-related bonuses, is misplaced.

Further, Respondent's waiver argument based on the fact that the Union did not demand bargaining or file a grievance in February 2012, is incorrect as a matter of law. (Resp. Br. at 13-14). While a union may be found to have waived its right to bargain over a change, such will be the case only if the employer meets its obligation to provide the union with notice prior to implementing the change and an opportunity to bargain. *Associated Milk Products, Inc.*, 300 NLRB 561, 564 (1990), citing *Gibbs & Cox, Inc.*, 292 NLRB 757 (1989); *Citizens National Bank of Willmar*, 245 NLRB 389 (1979). Respondent never notified the Union that it planned to cease its practice of providing food to its employees in February 2012, but rather only told its employees. (Tr. 130:24-131:2, 136:19-23, 138:1-12; RX 11). Such notice to employees does not constitute notice to the Union. *See Fire Tech Systems, Inc.*, 319 NLRB 302, 305 (1995), citing *NLRB v. Walker Construction Co.*, 928 F. 2d 695, 696-707 (5th Cir. 1991).

Finally, even if Respondent had provided evidence that notice was given to the Union, the fact that the Union did not demand to bargain or otherwise protest the temporary change in 2012 does not operate as waiver in the instant matter. *See Delta Tube & Fabricating Corp.*, 323 NLRB 856, 862 (1997). Moreover, Respondent's argument that the Union's failure to demand bargaining in 2012 somehow establishes that the Union did not believe Respondent had an obligation to bargain over changes is not supported by Board law and should be rejected. As such, the Judge properly found that Respondent had a past practice of providing free food that it unilaterally changed.

3. The Judge Properly Found that Respondent's Suspension of its QA Sample Practice was not Necessitated By Law

In *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), the Board recognized two limited exceptions excusing an employer's obligation to bargain before implementing a change to bargaining unit employees' term and conditions of employment: when a union engages in tactics designed to delay bargaining and when economic exigencies compel prompt action. It is not disputed that Respondent made no attempt to bargain with the Union over its decision to cease its food-distribution practice. Thus, the first exception does not apply.

As for economic exigencies, the Board held in *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995), that, in order to establish such a defense, an employer must show either that the circumstances required implementation at the time action was taken or the existence of a business "emergency that requires prompt action." The Board requires the employer to show not only that the changes were "compelled," but that the exigency was "caused by external events" beyond its control or "not reasonably foreseeable." *Id.* at 82.

Respondent claims it was justified in not bargaining with the Union based on alleged concerns relating to U.S.D.A. regulations relating to the sale of QA samples. However, as correctly found by the Judge, the record evidence did not support such an excuse. Indeed, there was no evidence to show that

Respondent was required to cease the practice of providing employees sample products in the cafeteria in order to comply with law. (ALJD 25:23-25). Thus, Respondent's reliance on *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987), where an employer's change was made to comply with OSHA regulations, is misplaced and was correctly rejected by the Judge. (ALJD 25:22-25).

C. The Judge Correctly Found That Respondent Violated §§ 8(a)(1) and (5) by Unilaterally Altering its Plant Visitation and Access Rules (Exceptions 5-6)

A change in the parties' practice with respect to visitation by union representatives constitutes a material change. *Ernst Home Centers*, 308 NLRB 848, 848-49 (1992). Accordingly, an employer violates §§ 8(a)(1) and (5) by unilaterally altering the parties' contractual visitation provisions or practice. *See, e.g., Turtle Bay Resorts*, 353 NLRB 1242, 1273 (2009); *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), *enfd. sub nom. NLRB v. Unbelievable, Inc.*, 71 F. 3d 1434 (9th Cir. 1995); *Ernst Home Centers*, 308 NLRB at 848-49.

As the Judge properly found, the undisputed evidence is that on April 22, Ligon sent Davies a letter attached to an e-mail message claiming that Davies violated the visitation policy in the parties' collective bargaining agreement. (ALJD 12:34-36; Tr. 70:12-14; JTX 2 pp. 11-12; JTX 4). In the letter, Ligon set forth new requirements for Davies' visits to the Plant, including that: Davies provide Ligon with 24 hours notice of the date, time and purpose of his visits to the Plant; Ligon or Schofield sign Davies in and out of the Plant; Davies limit his visits to the lunch room and to a "respectable" amount of time;[6] and Davies limit his visits to Respondent's Administrative Hours (Monday-Thursday, 7 am – 4:30 pm, and Friday from 7 am - 4 pm). (ALJD 12:36-13:2; JTX 2, pp.11-12, JTX 4, p.3). It is also undisputed that Davies was not given advance notification of these changes, and Respondent did not bargain over the changes with the Union.

[6] While Respondent (Resp. Br. at 5, fn. 2) alleges that the General Counsel did not proffer any evidence regarding the allegation that the employer requested that Union not use the cafeteria as "Union hall" or that the employer requested that the Union limit the duration of their visits to "a respectable amount of time," such claim is unfounded as evidentiary support for both allegations is contained in Joint Exhibit 4.

(ALJD 13:2-4; Tr. 190:21-25, 191:10-13, 396:21-397:1). Thus, the overwhelming evidence supports the Judge's finding of a violation.

Further, as the Judge correctly found, the cases cited by Respondent, *Peerless Food Prods.*, 236 NLRB 161 (1978), *National Sea Prods.*, 260 NLRB 3 (1982), both involving a union representative's access to the production floor, are distinguishable because Davies never sought access to Respondent's production floor. (ALJD 28:12-15). The Judge also found *Nynex Corp.*, 338 NLRB 659 (2002), distinguishable, as it only involved an employer's requirement that a union representative show identification in order to access its facility, instead of using a magnetic access card, in contrast to the changes to Respondent's access policy in this matter, which were significantly more extensive. (ALJD 28:15-22).

III. RESPONDENT IMPROPERLY INCLUDED EXTRA-RECORD FACTS IN ITS SUPPORTING BRIEF

Respondent incorporated extra-record facts in its exceptions brief in order to support its arguments that the Judge's decision should not be upheld. This is improper. *See The Fund For the Public Interest*, 360 NLRB No. 110, n. 2 (2014). As such, the General Counsel respectfully requests that the Board strike the extra-record evidence.

In particular, the General Counsel respectfully requests that the Board strike the following portions of Respondent's brief for the reasons stated and not consider them in making its decision:

- Respondent's claim that Davies testified that he "started treating Schofield in a hostile and harassing manner" (Resp. Br. at 4), when no such statement was made.
- Respondent's claim that Ligon's changes were made to plant access rules "to harmonize them with the parties' collective bargaining agreement" (Resp. Br. at 5), when no such statement is in the record.
- Respondent's claim that Davies' conduct toward Schofield was "corroborated by multiple witnesses" (Resp. Br. at 8), when no such corroboration was presented at hearing.

- Respondent's claim that "Davies starred *[sic]* at Schofield" (Resp. Br. at 8 and n. 4), when such claim is unsupported by the record evidence.

- Respondent's claim that Davies admitted to calling one of Respondent's attorneys an 'ass' so that Harry [Respondent's Vice President] would "realize the depth of his antagonism for Respondent" (Resp. Br. at 10), when such claim is unsupported by the record evidence.

- Respondent's claim that the QA samples it provided were "no larger than a small hot pocket" (Resp. Br. at 12), when such claim is unsupported by the record evidence.

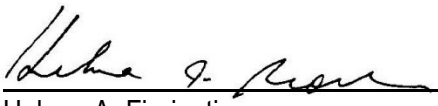
- Respondent's claim that "many employees never had the opportunity to enjoy QA samples" (Resp. Br. at 12), when such claim is unsupported by the record evidence.

IV. CONCLUSION

In light of the above and the record as a whole, the General Counsel respectfully requests that the Board affirm the Judge's rulings, findings and conclusions that Respondent violated §§ 8(a)(1) and (5), and that the Board adopt the remedial relief ordered by the Judge.

DATED at Portland, Oregon, this 24th day of April, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision And Motion to Strike Extra-Record Evidence was served on the 24th day of April, 2015, on the following parties:

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